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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

THE PEOPLE, Plaintiff and Appellant, v. SHARON MARIE OVERHOLTZER, Defendant and Appellant.	C078177 (Super. Ct. No. 12SCR07762)

A jury convicted defendant Sharon Marie Overholtzer of forgery, perjury, grand theft, and conspiracy to commit grand theft. The trial court suspended imposition of sentence and placed her on probation.

Defendant now contends (1) there is insufficient evidence to support her perjury convictions, and (2) the trial court committed instructional error regarding the perjury counts.

The Attorney General agrees with defendant's first contention, and we do too. Accordingly, we need not address defendant's second contention. We will strike the perjury convictions and affirm the judgment as modified.

BACKGROUND

Defendant was a daycare provider in Orland, California. She signed and submitted false attendance logs indicating that two children had been in her care on days when they were not, and she received public payment based on those false logs.

Under the CalWORKs Welfare-to-Work program, a parent participating in employment-related activities receives childcare subsidies. If the parent is exempted from the requirement to participate in employment-related activities, the subsidy ends.

In Glenn County, the Human Resource Agency (HRA) determines a parent's eligibility and authorizes childcare through a contract with the Child Care Resource Referral and Payment Program (CCRR). When a parent's subsidy ends due to an exemption from employment-related activities, the HRA notifies the parent and CCRR, which sends a Notice of Action to the parent and the childcare provider.

CCRR provides childcare referrals to licensed childcare providers, monitors the providers, and pays for childcare out of a block grant. A childcare schedule may be fixed (paying the provider even when a child is not attending the provider's facility) or variable (paying the provider only when the child is attending the facility, and capping the number of hours payable). CCRR notifies the parent and the provider of the schedule and number of hours payable.

A child's presence at a provider's facility is documented by attendance logs, which the provider must furnish to CCRR to get paid. Parents must sign children in and out and record the actual in and out times on the attendance log. At the end of the month, the parent and the provider must sign and date the attendance log, under the statement, "I certify that this is a true and accurate attendance report for the child named herein for the month indicated above"; the provider then submits the attendance log to CCRR.

CalWORKs Training Supervisor Kenneth Hahn, an HRA official, testified that regulations require parents and providers to sign the attendance logs under penalty of perjury. However, the statement of certification on Glenn County's attendance log form

does not include the words "under penalty of perjury" or anything similar. The instructions on the back of the attendance log form also do not state that the certification is made under penalty of perjury. The State Department of Social Services promulgates an online manual for counties participating in Welfare-to-Work, which states that signatures on attendance logs are to be provided under penalty of perjury. But parents and providers are not expected to study the manual and no evidence was offered that defendant had done so.

Defendant had contracted with CCRR as a provider since 2001. Every year, she received a Parent/Provider Handbook, a provider agreement, and other forms. None of those materials specified that the required certification of attendance is made under penalty of perjury. The CCRR case manager and case worker who worked with defendant had discussed rate schedules and attendance logs with her, but the case worker testified only that she told defendant the logs must be verified for accuracy and completeness.

Sanea Rich received a Welfare-to-Work assignment from HRA on November 19, 2010, which included childcare. HRA referred her to CCRR for childcare services, authorizing a variable schedule with a maximum of 40 hours per week for Sanea's daughters, Tyler and Jada.

Sanea selected defendant as her provider. Defendant was a longtime owner and operator of a daycare center and had no prior criminal record.

In January and February 2011, Tyler attended an afterschool program on certain dates, documented by forms signed by Tyler and Sanea; however, the attendance logs for those months, signed by defendant and Sanea, falsely showed that Tyler was present at defendant's center at those times. CCRR processed the attendance logs and paid defendant for caring for Tyler on those dates. The January attendance logs were the basis for counts 1 and 12; the February attendance logs were the basis for counts 2 and 13.

On March 17, 2011, Sanea received an exemption from Welfare-to-Work to care for Tyler, who had become chronically ill. According to Sanea, she told defendant around March 23, 2011, after receiving her exemption, that Tyler and Jada would not be coming to daycare for the time being, but Sanea wanted to ensure that they would have places for later, when Tyler was healthy again and Sanea was working. Believing it would enable her to keep her spot in defendant's center for the future, Sanea agreed to fill in dates and times and sign attendance logs falsely showing the children's presence there from the end of March 2011 through September 2011; she would come over and do so whenever defendant contacted her. Sanea told an HRA fraud investigator that defendant required Sanea to sign the logs to hold her spot.

But HRA failed to notify CCRR of the exemption, and thus CCRR did not promptly send Sanea or defendant a Notice of Action terminating childcare. The CCRR case manager did not learn of Sanea's ineligibility for childcare until September 2011; the manager did not process the September 2011 attendance log for payment.

In every month from March through September 2011, attendance logs signed by defendant and Sanea showed Tyler and Jada present at defendant's center when they were not. (Counts 3-9, 14-20.) Except for September 2011, CCRR paid defendant for those months based on care for both children.

Defendant admitted to the HRA fraud investigator that she knew attendance logs were required for payment and that she worked out a plan with Sanea to hold Sanea's spot open at defendant's center and to obtain payment for the periods when Sanea's daughters were not there by creating attendance logs that falsely showed the children's presence. But according to defendant, Sanea said in March 2011 that despite her exemption she could still use childcare to job hunt and defendant would still be paid; defendant said it was Sanea's idea to use the false attendance logs for that purpose. Defendant claimed she did not require any parent to sign attendance logs to save places for children who would be returning later.

The information alleged that from January through September 2011, defendant signed attendance sheets given to the Department of Child and Family Services falsely representing that daycare was provided to two children, and that she obtained compensation to which she was not legally entitled. Each allegedly false attendance log gave rise to one count of forgery (counts 1-9; Pen. Code, § 470, subd. (d))[1] and one count of perjury (counts 12-20; § 118, subd. (a)). In addition, defendant was charged with one count of grand theft (count 10; § 487, subd. (a)) and one count of conspiracy to commit grand theft (count 11; §§ 182, subd. (a), 484, subd. (a)) encompassing her entire course of conduct.

Defendant moved to set aside the information (§ 995) after a preliminary hearing. Regarding the perjury counts, she argued there was no evidence that she certified the attendance logs under penalty of perjury. The prosecutor countered that those words were not required: it was sufficient to show that defendant certified the logs to be true and accurate with knowledge that they were false. The trial court denied the section 995 motion.

Defendant did not testify. Her husband, a correctional officer at the county jail, testified that he had seen Sanea's daughters at the center (which operated out of defendant's and her husband's home) regularly during March through September 2011. Defendant also presented the testimony of two mothers with children in defendant's center who claimed to have seen Sanea's daughters there during the relevant period; both also opined that defendant had a reputation for honesty.

At the close of evidence, defendant moved for acquittal on the perjury counts pursuant to section 1118.1, repeating the argument made in her section 995 motion. The trial court denied the motion.

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[1] Undesignated statutory references are to the Penal Code.

The jury convicted defendant on all counts. The trial court suspended imposition of sentence, placed defendant on court probation for 36 months, and ordered defendant to pay $3,736.51 to the Glenn County Health and Human Services Agency.

DISCUSSION

I

Defendant contends there is insufficient evidence to support her convictions on the perjury counts because the prosecution failed to prove that she knowingly made false statements under a duly sworn oath or under penalty of perjury. The Attorney General agrees.

Although defendant states that her appeal is from the final judgment of conviction, she couches her argument as an attack on the trial court's ruling denying her section 1118.1 motion. The distinction is immaterial to our analysis in this context, because our standard of review is essentially the same in determining whether the evidence was sufficient to sustain a conviction or to support the denial of a section 1118.1 motion: whether substantial evidence existed to justify a reasonable trier of fact in finding defendant guilty beyond a reasonable doubt. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1182-1183 (*Hajek*), overruled on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

Section 118, subdivision (a), provides: "Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury."

"The term 'oath,' as used in [section 118], includes an affirmation and every other mode authorized by law of attesting the truth of that which is stated." (§ 119.)

"A 'declaration' [within the meaning of section 118] is an unsworn written statement certified to be true under penalty of perjury. (Code Civ. Proc., § 2015.5.) A 'certificate' is ' " 'a written testimony to the truth of any fact.' " ' [Citations.]" (*People v. Griffini* (1998) 65 Cal.App.4th 581, 586-587.) In light of Code of Civil Procedure section 2015.5, perjury may be committed by an unsworn written certification where " 'the law permits or requires written statements under oath,' " but only if such unsworn certification " 'contain[s] a declaration that it is made "under penalty of perjury." [Citation.]' " (*Griffini,* at p. 593.)

The information alleged as to counts 12 through 20 that defendant, "being a person who, having taken an oath, did, and contrary to such oath, state as true a material matter which she knew to be false." However, the parties agree there was no evidence defendant took any oath, apart from the certifications on the attendance logs. Thus, defendant's perjury convictions can stand only if those certifications constituted declarations made under penalty of perjury. We agree with the parties that, on the evidence presented at trial, they did not.

Although a CalWORKs regulation states that the certification is to be made under penalty of perjury, the manual in which that regulation appears is not given out to clients or providers, and no evidence was presented that defendant read or should have read the manual. None of the relevant forms and materials given to defendant by the county, including the attendance logs, the instructions on the back for filling them out, and the discussions of documenting attendance in the Parent/Provider Handbook, used the words "under penalty of perjury" or any equivalent expression when describing the required certification. No CCRR employee who worked with defendant or processed her paperwork ever told her of this requirement, so far as their testimony shows. In short,

proof of this essential element of perjury was entirely lacking. Defendant's perjury convictions must be stricken.

DISPOSITION

The judgment is modified to strike defendant's perjury convictions on counts 12 through 20. The judgment is affirmed as modified.

/S/
MAURO, J.

We concur:

/S/
HULL, Acting P. J.

/S/
MURRAY, J.